JUDGMENT OF THE COURT
28 September 1994 *

In Case C-128/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Kantongerecht (Cantonal Court) Utrecht (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Geertruida Catharina Fisscher

and

(1) Voorhuis Hengelo BV,

(2) Stichting Bedrijfspensioenfonds voor de Detailhandel,

on the interpretation of Article 119 of the EEC Treaty with regard to the right to join an occupational pension scheme, the judgment of the Court of Justice of 17 May 1990 in Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889 and the Protocol concerning Article 119 of the Treaty establishing the European Community annexed to the Treaty on European Union of 7 February 1992,

* Language of the case: Dutch.

THE COURT,

composed of: O. Due, President, G. F. Mancini (Rapporteur), J. C. Moitinho de Almeida, M. Diez de Velasco and D. A. O. Edward (Presidents of Chambers), C. N. Kakouris, R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: W. Van Gerven,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Mrs Fisscher, by T. P. J. de Graaf, of the Utrecht Bar,

— Voorhuis Hengelo BV and Stichting Bedrijfspensioenfonds voor de Detailhandel, by O. W. Brouwer, of the Amsterdam Bar,

— the German Government, by E. Röder, Ministerialrat at the Federal Ministry of Economic Affairs, and C.-D. Quassowski, Regierungsdirektor at the same Ministry, both acting as Agents,

— the United Kingdom, by J. E. Collins, Assistant Treasury Solicitor, acting as Agent, assisted by N. Paines, Barrister,

— the Commission of the European Communities, by K. Banks and B. J. Drijber, of its Legal Service, both acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Fisscher, represented by M. Greebe, of the Utrecht Bar, Voorhuis Hengelo BV and Stichting Bedrijspensioenfonds voor de Detailhandel, represented by O. W. Brouwer and F. P. Louis, of the Brussels Bar, the German Government, the United Kingdom and the Commission at the hearing on 26 April 1994,

after hearing the Opinion of the Advocate General at the sitting on 7 June 1994,

gives the following

Judgment

1 By judgment of 18 March 1993, received at the Court on 26 March 1993, the Kantongerecht (Cantonal Court) Utrecht referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty questions on the interpretation of Article 119 of that Treaty concerning the right to join an occupational pension scheme, the judgment of the Court of Justice of 17 May 1990 in Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889 (hereinafter 'the *Barber* judgment') and the Protocol concerning Article 119 of the Treaty establishing the European Community annexed to the Treaty on European Union of 7 February 1992 (hereinafter 'Protocol No 2').

2 The questions have been raised in proceedings between Mrs Fisscher and Voorhuis Hengelo BV and Stichting Bedrijfspensioenfonds voor de Detailhandel concerning her membership of that occupational pension scheme.

3 Mrs Fisscher was employed by Voorhuis Hengelo BV ('Voorhuis') from 1 January 1978 to 10 April 1992, working 30 hours a week.

4 Voorhuis' employees are members of the occupational pension scheme administered by the Stichting Bedrijfspensioenfonds voor de Detailhandel. However, until 31 December 1990 Mrs Fisscher was not admitted to the scheme since the rules of the scheme excluded married women.

5 On 1 January 1991 the scheme was extended to married women so that Mrs Fisscher was able to join it with effect from 1 January 1988.

6 Mrs Fisscher then challenged the old rules on the ground that they were incompatible with Article 119 of the Treaty. She considered that as from 8 April 1976, the date of the judgment in Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455 in which the Court held for the first time that Article 119 has direct effect, the scheme should have been open to married women as well. She therefore claimed retroactive membership as from 1 January 1978, the date when she entered Voorhuis' service.

7 Faced with Mrs Fisscher's claim, the Cantonal Court, Utrecht, decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the right to equal pay laid down in Article 119 of the EEC Treaty include the right to join an occupational pension scheme such as that at issue in this case which is made compulsory by the authorities?

(2) If the answer to Question 1 is in the affirmative, does the temporal limitation imposed by the Court in *Barber* for pension schemes such as those considered

in that case ("contracted-out schemes") apply to the right to join an occupational pension scheme such as that at issue in this case, from which the plaintiff was excluded because she was a married woman?

(3) Where membership of a pension scheme applied in an undertaking is made compulsory by law, are the administrators of the scheme (the occupational pension fund) bound to apply the principle of equal treatment laid down in Article 119 of the EEC Treaty, and may an employee who has been prejudiced by failure to apply that rule sue the pension fund directly as if it were the employer?

In considering this question it may be relevant that the Cantonal Court has no jurisdiction to hear a claim based on unlawful conduct, since the extent of the claim exceeds the limits of its jurisdiction. In this case, therefore, it is relevant to know whether the plaintiff may claim against the pension fund (the second defendant) on the basis of her contract of employment.

(4) If under Article 119 of the EEC Treaty the plaintiff is entitled to be a member of the occupational pension scheme from a date prior to 1 January 1991, does that mean that she is not bound to pay the premiums which she would have had to pay had she been admitted earlier to the pension scheme?

(5) Is it relevant that the plaintiff did not act earlier to enforce the rights which she now claims to have?

(6) Do the Protocol concerning Article 119 of the EEC Treaty appended to the Treaty of Maastricht ("the *Barber* Protocol") and the (draft law amending) the transitional Article III of Draft Law 20 890, which is intended to implement

the Fourth directive, affect the assessment of this case which was brought before the Cantonal Court by writ of summons issued on 16 July 1992?'

The first question

8 By its first question the national court asks whether the right to join an occupational pension scheme falls within the scope of Article 119 of the Treaty and is therefore covered by the prohibition of discrimination there laid down.

9 In its judgment of 13 May 1986 in Case 170/84 *Bilka-Kaufhaus GmbH* v *Hartz* [1986] ECR 1607, the Court has already held that if a pension scheme, although adopted in accordance with the provisions laid down by national legislation, is based on an agreement with the employees or their representatives and if the public authorities are not involved in its funding, such a scheme does not constitute a social security scheme governed directly by statute and thus falls outside the scope of Article 119, and that benefits paid to employees under the scheme constitute consideration received by the employees from the employer in respect of their employment, as referred to in the second paragraph of Article 119 (paragraphs 20 and 22).

10 Those principles were confirmed by the *Barber* judgment with regard to contracted-out occupational pension schemes governed by United Kingdom law and by the judgment of 6 October 1993 in Case C-109/91 *Ten Oever* v *Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf* [1993] ECR I-4879.

11 In that judgment, the Court held Article 119 to be applicable to benefits payable under a Dutch occupational scheme similar to that in question in the present case. It pointed out in particular that the rules of the pension scheme were not laid

down directly by law but were the result of negotiation between both sides of the industry concerned and that all that the public authorities did was, at the request of such employers' and trade union organizations as were considered to be representative, to declare the scheme compulsory for the whole of the industry concerned (paragraph 10).

12 It also follows from the *Bilka* judgment, cited above, that Article 119 covers not only entitlement to benefits paid by an occupational pension scheme but also the right to be a member of such a scheme.

13 The reasoning behind that finding is that if, as can be seen from the judgment of 31 March 1981 in Case 96/80 *Jenkins* v *Kingsgate (Clothing Productions) Ltd* [1981] ECR 911, a pay policy which consists of setting a lower hourly rate for part-time work than for full-time work may in certain cases entail discrimination between men and women, the same applies where part-time workers are refused a company pension. Since such a pension falls within the concept of 'pay', within the meaning of the second paragraph of Article 119, it follows that, hour for hour, the total remuneration paid by the employer to full-time workers is higher than that paid to part-time workers (paragraph 27).

14 It follows that an occupational pension scheme which excludes married women from membership entails discrimination directly based on sex, contrary to Article 119 of the Treaty.

15 The answer to the first question must therefore be that the right to join an occupational pension scheme falls within the scope of Article 119 of the Treaty and is therefore covered by the prohibition of discrimination laid down by that article.

The second question

16 By its second question, the national court asks whether the limitation of the effects in time of the *Barber* judgment also applies to the right to join an occupational pension scheme such as that in question in the main proceedings.

17 In order to reply to this question, it is important to remember the context in which it was decided to limit the effects in time of the *Barber* judgment.

18 According to its established case-law, the Court may exceptionally, having regard to the general principle of legal certainty inherent in the Community legal order and the serious difficulties which its judgment may create as regards the past for legal relations established in good faith, find it necessary to limit the possibility for interested parties, relying on the Court's interpretation of a provision, to call in question those legal relations (see the *Defrenne* judgment, cited above). The Court was therefore concerned to establish that the two essential criteria were fulfilled for deciding to impose such a limitation, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties.

19 As regards the criterion of good faith, the Court found first of all (in paragraph 42) that Article 9(a) of Council Directive 86/378/EEC of 24 July 1986, on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ 1986 L 225, p. 40), provided for the possibility of deferring the compulsory implementation of the principle of equal treatment with regard to the determination of pensionable age, as did the exception provided for in Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).

20 The Court went on to hold that in the light of those provisions the Member States and the parties concerned were reasonably entitled to consider that Article 119 did not apply to pensions paid under contracted-out schemes and that derogations from the principle of equality between men and women were still permitted in that sphere (paragraph 43).

21 In this connection, the Court in its judgment of 14 December 1993 in Case C-110/91 *Moroni* v *Collo GmbH* [1993] ECR I-6591, after referring to and confirming the principles stated in the *Defrenne*, *Bilka* and *Barber* judgments, cited above, explained that *Barber* dealt for the first time with the question how unequal treatment arising from the setting of different retirement ages for the two sexes was to be viewed under Article 119 (paragraph 16).

22 As regards the criterion of serious difficulties, the Court also held in the *Barber* judgment that if any male worker concerned could, like Mr Barber, retroactively assert the right to equal treatment in cases of discrimination which, until then, could have been considered permissible in view of the exceptions provided for in Directive 86/378, the financial balance of many occupational schemes might be upset retroactively (paragraph 44).

23 In those circumstances the Court ruled that the direct effect of Article 119 of the Treaty may be relied upon, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of service subsequent to 17 May 1990, except in the case of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law (paragraph 45 of the *Barber* judgment, as clarified in the *Ten Oever* judgment).

24 It follows, in particular, from the foregoing that the limitation of the effects in time of the *Barber* judgment concerns only those kinds of discrimination which employers and pension schemes could reasonably have considered to be permissi-

ble, owing to the transitional derogations for which Community law provided and which were capable of being applied to occupational pensions.

25 It must be concluded that, as far as the right to join an occupational scheme is concerned, there is no reason to suppose that the professional groups concerned could have been mistaken about the applicability of Article 119.

26 It has indeed been clear since the judgment in the *Bilka* case that a breach of the rule of equal treatment committed through not recognizing such a right is caught by Article 119.

27 Moreover, since the Court's judgment in the *Bilka* case included no limitation of its effects in time, the direct effect of Article 119 can be relied upon in order retroactively to claim equal treatment in relation to the right to join an occupational pension scheme and this may be done as from 8 April 1976, the date of the *Defrenne* judgment in which the Court held for the first time that Article 119 has direct effect.

28 The answer to the second question must therefore be that the limitation of the effects in time of the *Barber* judgment does not apply to the right to join an occupational pension scheme.

The third question

29 By its third question the national court asks whether the administrators of the occupational pension scheme must, like the employer, act in accordance with Article 119 of the Treaty and whether the worker discriminated against may assert his rights directly against the administrators.

30 In the *Barber* judgment the Court, having held that pensions paid under contracted-out schemes fall within the scope of Article 119, held that it makes no difference if the scheme has been set up in the form of a trust and is administered by trustees who are formally independent of the employer, since Article 119 also applies to consideration received indirectly from the employer (paragraphs 28 and 29).

31 Since the administrators of a pension scheme, although not party to the employment relationship, are called upon to pay out benefits which constitute pay within the meaning of Article 119, they must comply with that provision by doing all within their powers to ensure that the principle of equal treatment is observed in this respect, and scheme members must be able to rely upon it as against them. The effectiveness of Article 119 would be considerably diminished and the legal protection required to achieve real equality would be impaired if an employee could rely on that provision only as against the employer and not against the administrators of the scheme who are expressly charged with performing the employer's obligations.

32 The answer to the third question must therefore be that the administrators of an occupational pension scheme must, like the employer, comply with the provisions of Article 119 of the Treaty and that a worker who is discriminated against may assert his rights directly against those administrators.

The fourth question

33 By the fourth question the national court asks whether the fact that a worker can claim retroactively to join an occupational pension scheme allows the worker to avoid paying the contributions relating to the period of membership concerned.

34 As far as the right to be a member of an occupational scheme is concerned, Article 119 requires that a worker should not suffer discrimination based on sex by being excluded from such a scheme.

35 This means that, where such discrimination has been suffered, equal treatment is to be achieved by placing the worker discriminated against in the same situation as that of workers of the other sex.

36 It follows that the worker cannot claim more favourable treatment, particularly in financial terms, than he would have had if he had been duly accepted as a member.

37 The answer to the fourth question must therefore be that the fact that a worker can claim retroactively to join an occupational pension scheme does not allow the worker to avoid paying the contributions relating to the period of membership concerned.

The fifth question

38 By the fifth question the national court asks in substance whether the national rules relating to time-limits for bringing actions under national law may be relied on as against workers who assert their right to join an occupational pension scheme.

39 The Court has consistently held that, in the absence of Community rules on the matter, the national rules relating to time-limits for bringing actions are also appli-

cable to actions based on Community law, provided that they are no less favourable for such actions than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by Community law impossible in practice (see, in particular, the judgment of 16 December 1976 in Case 33/76 *Rewe-Zentralfinanz eG and Another* v *Landwirtschaftskammer für das Saarland* [1976] ECR 1989, paragraphs 5 and 6).

40 The answer to the fifth question must therefore be that the national rules relating to time-limits for bringing actions under national law may be relied on against workers who assert their right to join an occupational pension scheme, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by Community law impossible in practice.

The sixth question

41 By the sixth question the national court wishes to know what effect the draft national Law designed to implement Directive 86/378, on the one hand, and Protocol No 2, on the other hand, may have in the context of the present case.

42 As regards the draft national Law, the Court has consistently held that in proceedings under Article 177 of the Treaty it is not for the Court to interpret national law and assess its effects (see, in particular, the judgment of 3 February 1977 in Case 52/76 *Benedetti* v *Munari* [1977] ECR 163, paragraph 25).

43 Protocol No 2 which, by virtue of Article 239 of the Treaty, is an integral part of the Treaty is worded as follows:

'For the purposes of Article 119 of this Treaty, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law.'

44 The file and the pleadings show that the crucial point is whether Protocol No 2 is intended only to clarify the limitation of the effects in time of the Barber judgment, as set out above, or whether it has wider scope.

45 According to Voorhuis, the Stichting Bedrijfspensioenfonds voor de Detailhandel and the United Kingdom, the broad wording of Protocol No 2 indicates that it applies to every kind of discrimination based on sex which may exist in occupational pension schemes, including discrimination concerning the right to join such schemes.

46 The plaintiff in the main proceedings, the German Government and the Commission take the opposite view and submit that, despite the very general terms in which it is worded, Protocol No 2 must be read in conjunction with the *Barber* judgment and cannot have a scope wider than the limitation of its effects in time.

47 It should be observed here that, since it is in general terms, Protocol No 2 is applicable to the benefits paid under an occupational pension scheme.

48 That conclusion must, however, be qualified. It relates only to benefits — being all that is mentioned in Protocol No 2 — and not to the right to belong to an occupational social security scheme.

49 It is clear that Protocol No 2 is linked to the *Barber* judgment, since it refers to the date of that judgment, 17 May 1990. That judgment declares unlawful discrimination as between men and women resulting from an age condition for entitlement to a retirement pension upon dismissal for economic reasons which varies according to sex. There have been divergent interpretations of the *Barber* judgment which limits, with effect from the date of the judgment, namely 17 May 1990, the effect of its interpretation of Article 119 of the Treaty. Those divergences were removed by the judgment in *Ten Oever*, cited above, which was delivered before the entry into force of the Treaty on European Union. While extending it to all benefits payable under occupational social security schemes and incorporating it in the Treaty, Protocol No 2 essentially adopted the same interpretation of the *Barber* judgment as did the *Ten Oever* judgment. It did not, on the other hand, any more than the *Barber* judgment, deal with, or make any provision for, the conditions of membership of such occupational schemes.

50 The question of membership is thus governed by the judgment in *Bilka*, cited above, in which it as held that Article 119 of the Treaty had been infringed by an undertaking which, without objective justification unrelated to any discrimination on grounds of sex, accorded different treatment to men and women by excluding a category of employees from a company pension scheme. It should be noted that *Bilka* does not limit the temporal effects of its interpretation of Article 119 of the Treaty.

51 The answer to the sixth question must therefore be that Protocol No 2 does not affect the right to join an occupational pension scheme, which is governed by the *Bilka* judgment.

Costs

52 The costs incurred by the German Government, the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Kantongerecht Utrecht by judgment of 18 March 1993, hereby rules:

1. The right to join an occupational pension scheme falls within the scope of Article 119 of the Treaty and is therefore covered by the prohibition of discrimination laid down by that article.

2. The limitation of the effects in time of the judgment of 17 May 1990 in Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* does not apply to the right to join an occupational pension scheme.

3. The administrators of an occupational pension scheme must, like the employer, comply with the provisions of Article 119 of the Treaty and a

worker who is discriminated against may assert his rights directly against those administrators.

4. The fact that a worker can claim retroactively to join an occupational pension scheme does not allow the worker to avoid paying the contributions relating to the period of membership concerned.

5. The national rules relating to time-limits for bringing actions under national law may be relied on against workers who assert their right to join an occupational pension scheme, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by Community law impossible in practice.

6. The Protocol concerning Article 119 of the Treaty establishing the European Community, annexed to the Treaty on European Union, does not affect the right to join an occupational pension scheme, which is governed by the judgment of 13 May 1986 in Case 170/84 *Bilka-Kaufhaus GmbH* v *Hartz*.

Due Mancini Moitinho de Almeida

Diez de Velasco Edward Kakouris Joliet

Schockweiler Rodríguez Iglesias Grévisse

Zuleeg Kapteyn Murray

Delivered in open court in Luxembourg on 28 September 1994.

R. Grass O. Due

Registrar President